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IN THE
SUPREME COURT OF THE
UNITED STATES
October Term 1974
No. 74-671

THE STATE OF CALIFORNIA,
Petitioner,

vs.

PAUL HARRIS and
FAWN HARRIS,
Respondents.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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Respondents, PAUL AND FAWN HARRIS, respectfully submit their response to the Petition for a Writ of Certiorari filed by Petitioner, STATE OF CALIFORNIA.

I

CERTIORARI SHOULD BE DENIED BECAUSE THE COURT OF APPEALS, FAMILIAR WITH THE CALIFORNIA PRACTICE, REASONABLY CONCLUDED THAT RESPONDENTS HAD EXHAUSTED THEIR STATE REMEDIES IN THE COURTS OF CALIFORNIA.

In an en banc hearing, without dissent, the thirteen Judges of the United States Court of Appeals for the Ninth Circuit concluded that Respondents had exhausted their state remedies when their Petitions for Writs of Habeas Corpus were denied without opinion by the California Supreme Court.[1/]

In reaching its conclusion, the Court of Appeals made an extensive inquiry into the particular practice of the California Supreme Court in passing on petitions seeking habeas corpus. Although the issue of exhaustion of state remedies is, of course, a federal question properly reviewable here, the procedural requisites of habeas corpus in the Courts of California is a state question. Specifically, whether Respondents' Petitions for Habeas Corpus were denied on the merits or on procedural grounds is

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1/ Arguably, under this Court's decision in Anderson v. Nelson, 390 U.S. 523 (1968) Respondents had exhausted their state remedies even without the filing of a Petition for Writ of Habeas Corpus in the California Supreme Court. See 390 U.S. at page 525.

essentially a question of California practice. This Court has long deferred to the Courts of Appeal on questions of state practice in the state in which the Court of Appeals sits. See, e.g., Huddleston v. Dwyer, 322 U.S. 232, 237 (1944); Estate of Spiegel v. Commissioner, 335 U.S. 701 (1949). As this Court st stated in Spiegel, 335 U.S. at pages 707-708:

> "The questioned ruling was made by three [federal] judges who are constantly required to pass upon [state] questions. One of the three judges has long been a resident and lawyer of Illinois . . . Under these circumstances we will follow our general policy and leave undisturbed this Court of Appeals holding on a question of state law."

The question of state law, in the instant case, is whether the Harris' Petitions for Habeas Corpus in the California Supreme Court were denied on their merits or on procedural grounds. Of the thirteen judges of the Court of

Appeals for the Ninth Circuit who heard the case below, seven (Judges Koelsch, Duniway, Ely, Hufstedler, Wallace, Sneed, and Merrill) are residents of the State of California. Two of the seven (Judges Duniway and Hufstedler) formerly sat on the California Appellate Courts. The author of the Court of Appeals Opinion below, Judge Duniway, formerly sat as a Justice of the California Court of Appeal. No dissenting opinion was filed below. Respondents believe that the Court of Appeals correctly interpreted the practice of the California Supreme Court pertaining to determination of original petitions for habeas corpus. Accordingly, it is submitted that this Court should defer to its general practice and leave undisturbed a decision on state law by the Court of Appeals. Huddleston v. Dwyer, supra, at ,237; Estate of Spiegel, supra, at 707-708.

II

THE DECISION BELOW IS NOT IN CONFLICT WITH THIS COURT'S DECISION IN EX PARTE HAWK OR ANY OTHER CASE.

Petitioner contends at length that the decision below is in "direct conflict with this Court's decisions in Ex Parte Hawk and Darr v. Burford" (Petition at 12-15). The decision by this Court in Ex Parte Hawk, 321 U.S. 114 (1944) was directly grounded on and attributable to the laws of Nebraska. In Nebraska, unlike California, the state's highest court has required a party seeking habeas corpus to initially file a petition for such writ in the state trial court. As stated by the Nebraska Supreme Court recently in State v. Goham, 216 N.W.2d 869, 870 (1974):

> ". . . we initially require a party to file a petition for a writ of habeas corpus in the state trial court." (Emphasis added.)

Apparently under Nebraska practice, after denial of habeas corpus relief by the state trial court, an automatic appeal lies to the Nebraska Supreme Court. The California practice is significantly different. In California there is no requirement that a habeas petitioner

first file his petition in the state trial court.[2/] Although the California Appellate Courts have indicated, on occasion, that where factual questions are raised by a habeas petition it is preferable that, in some instances, such petitions be initially filed in the state trial court, nowhere is there a California requirement, as in Nebraska, that such practice be followed. Indeed, as the Court of Appeals in the present case noted, Appendix A to Petition at 8, the California Supreme Court has on numerous occasions in the past five years determined habeas petitions which were intially filed in the State Supreme Court. When a habeas petition filed in the California Supreme Court raises an issue of fact, the California Supreme Court has generally adopted one of two procedures: First, under the provisions of Section 1508 of the California Penal Code, quoted

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2/ Art. 6, Sec. 10 of the California Constitution confers original habeas corpus jurisdiction in the California Supreme Court, as well as the California Courts of Appeal and Superior Courts.

below,[3] the court may direct that the writ of habeas corpus be returnable before a judge of the state trial court (Superior Court). Such a procedure was followed in, In re Hochberg, 2 Cal.3d 870, 873, 87 Cal.Rptr. 681, 471 P.2d 1 (1970). In other instances, the California Supreme Court, instead of directing that the habeas writ be heard before a judge of the state trial court, will appoint a

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3/ Section 1508 of the California Penal Code provides:

"Judge or court before which writ may be made returnable

"(a) A writ of habeas corpus issued by the Supreme Court or a judge thereof may be made returnable before the issuing judge or his court, before any court of appeal or judge thereof, or before any superior court or judge thereof.

"(b) A writ of habeas corpus issued by a court of appeal or a judge thereof may be made returnable before the issuing judge or his court or before any superior court or judges thereof located in that appellate district.

"(c) A writ of habeas corpus issued by a superior court or a judge thereof may be made returnable before the issuing judge or his court."

referee to take testimony on issues of fact raised. See, for example, In re Watson, 6 Cal.3d 831, 100 Cal.Rptr. 720, 494 P.2d 1264 (1972); In re Weber, 11 Cal.3d 703, ___Cal.Rptr.___, ___P.2d___ (1974); In re Downs, 3 Cal.3d 694, 91 Cal.Rptr. 612, 478 P.2d 44 (1971). As the Court of Appeals noted below (Appendix A, at 8), since 1969, the California Supreme Court in denying petitions for habeas corpus had never cited In re Hillery, 202 Cal.App.2d 293, 20 Cal.Rptr. 759 (1962), a case which stands for the proposition that an appellate court may refuse to entertain a petition for habeas corpus which could have been filed in the state trial court.

Further, unlike the Nebraska Supreme Court, the California Supreme Court since 1969 has decided on their merits at least 70 habeas corpus cases with full opinion. The list of those cases is attached hereto as the Appendix. Accordingly, it is quite apparent that the habeas corpus practice in the courts of California differs in significant respects from that which obtains in the Courts of Nebraska. Accordingly, the decision in Ex Parte

Hawk, predicated on Nebraska practice, should have no bearing on the practice in California. Far from being in conflict with any decision of this Court or other Circuits, the decision below is in full accord with the other Circuits. See for example, Young v. State of Alabama, 427 F.2d 177, 178 (5th Cir. 1970):

> ". . . it is well established that if a federal habeas corpus petitioner has once presented a claim to the highest court of the state, he has exhausted his state remedies insofar as that claim is concerned."

Accord, Coleman v. Maxwell, 351 F.2d 285, 286 (6th Cir. 1965); Francisco v. Gathright, ___U.S.___, 42 L.Ed.2d 226 (1974); Brown v. Allen, 344 U.S. 443, 448, 502 (1953); see also Anderson v. Nelson, supra, 390 U.S. 523, at 525 where this Court stated that a late filing of a petition for hearing in the California Supreme Court, which the state court would not accept for filing, did not constitute a deliberate bypass of state remedies. Indeed, under the decision of this Court

in Anderson v. Nelson, supra, Respondents would have exhausted their state remedies even if they had filed no petition for habeas corpus in the California Supreme Court. That conclusion flows from the fact that Respondents' federal habeas corpus petitions alleged that they filed no petition for hearing in the California Supreme Court because they were not informed of their right to file such a petition until after the time for petitioning the California Supreme Court for a hearing had expired.[4/]

4/ The jurisdiction of the California Supreme Court to review the decisions of the State Courts of Appeal is found in Rule 28 of the California Rules of Court. Under the provisions of Rule 28, within ten days after a decision of California Court of Appeal on direct appeal becomes final, a petition for hearing may be filed in the California Supreme Court. Under Rule 28, a hearing may be granted only upon an order of at least four of the seven justices of the California Supreme Court. A petition for hearing in the California Supreme Court is not a "second appeal" but rather a discretionary hearing obtained only by the vote of at least four of the seven justices of that Court. See People v. Davis, 147 Cal.

(continued)

Petitioner suggests that following the decision of the Court of Appeals in the present case, the California Supreme Court, in apparent response to the decision below, "issued an order denying a petition for hearing" without prejudice to the filing of a petition for writ of habeas corpus in the Superior Court. Petition for Certiorari, Page 7, Footnote 5. Petitioner cites the minutes of the California Supreme Court for July 25, 1974, in People v. Wolford. Petitioner's citation of Wolford is wholly misleading. The actual order in Wolford, as reflected

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4/ (continued)
346, 348 (1905). The time limits provided in Rule 28 for petitioning for hearing are strictly construed and untimely petitions for hearing may not be filed. See Anderson v. Nelson, supra, 390 U.S. at 523. Where a defendant, after direct appeal to the intermediate state appellate court (the Court of Appeal), fails to petition the California Supreme Court for a hearing, and the time for filing such a petition for hearing has expired, the defendant's appropriate remedy is to seek habeas corpus in the State Supreme Court. See In re Lopez, 3 Cal.3d 147, 149, 89 Cal.Rptr. 614, 474 P.2d 430 (1970). That procedure was utilized by respondents in the present case.

in the minutes of the California Supreme Court, in its entirety reads as follows:

> "(2d Crim. 22629, Div. 1,)
> . . . People v. Wolford, Appellant's petition for hearing denied without prejudice to the filing of a petition for writ of habeas corpus in the Superior Court. (See In re Candelario) (1970) 3 Cal.3d 702." (Emphasis added.)

As indicated in Footnote 4 supra, a petition for hearing in the California Supreme Court lies to review on direct appeal a prior decision of the state court of appeal. The Wolford case did not involve a petition for habeas corpus; accordingly, it is misleading for petitioner to intimate that Wolford involved an original habeas corpus petition filed in the California Supreme Court.

CONCLUSION

For each of the above reasons, it is respectfully requested that the Petition for Writ of Certiorari be denied.

Respectfully submitted
MICHAEL KORN
Attorney for Respondents

APPENDIX

APPENDIX

HABEAS CORPUS PROCEEDINGS DECIDED BY CALIFORNIA SUPERIOR COURT WITH FULL OPINION 1969 - 1974

In Re Bushman, 1 Cal.3d 767,
83 Cal.Rptr. 375, 463 P.2d 727 (1970)

In Re Kay, 1 Cal.3d 930,
83 Cal.Rptr. 686, 464 Pac. 142 (1970)

In Re Kemp, 1 Cal.3d 190,
81 Cal.Rptr. 609, 460 P.2d 481 (1969)

In Re Lara, 1 Cal.3d 486,
82 Cal.Rptr. 628, 462 P.2d 380 (1969)

In Re Martinez, 1 Cal.3d 641,
83 Cal.Rptr. 382, 463 P.2d 734 (1970)

In Re Mosley, 1 Cal.3d 931,
83 Cal.Rptr. 809, 464 P.2d 473 (1970)

In Re Tahl, 1 Cal.3d 122,
81 Cal.Rptr. 577, 460 P.2d 449 (1969)

In Re White, 1 Cal.3d 207,
81 Cal.Rptr. 780, 460 P.2d 980 (1969)

In Re Whitehorn, 1 Cal.3d 504,
82 Cal.Rptr. 609, 462 P.2d 361 (1969)

In Re Williams, 1 Cal.3d 168,
81 Cal.Rptr. 784, 460 P.2d 984 (1969)

In Re Harrell, 2 Cal.3d 765
87 Cal.Rptr. 504, 470 P.2d 640 (1970)

In Re Cowans, 2 Cal.3d 733,
87 Cal.Rptr. 499, 470 P.2d 635 (1970)

In Re Hochberg, 2 Cal.3d 870,
87 Cal.Rptr. 681, 471 P.2d 1 (1970)

In Re Lifschutz, 2 Cal.3d 415,
85 Cal.Rptr. 829, 467 P.2d 557 (1970)

In Re Lopez, 2 Cal.3d 141,
84 Cal.Rptr. 361, 465 P.2d 257 (1970)

In Re Marcario, 2 Cal.3d 329,
85 Cal.Rptr. 135, 466 P.2d 679 (1970)

In Re Montgomery, 2 Cal.3d 863,
87 Cal.Rptr. 695, 471 P.2d 15 (1970)

In Re Roberts, 2 Cal.3d 892,
87 Cal.Rptr. 833, 471 P.2d 481 (1970)

In Re Saunders, 2 Cal.3d 1033,
88 Cal.Rptr. 633, 472 P.2d 92 (1970)

In Re Smith, 2 Cal.3d 508,
86 Cal.Rptr. 4, 467 P.2d 836 (1970)

In Re Antazo, 3 Cal.3d 100,
89 Cal.Rptr. 255, 473 P.2d 999 (1970)

In Re Candelario, 3 Cal.3d 702,
91 Cal.Rptr. 497, 477 P.2d 729 (1970)

In Re Cox, 3 Cal.3d 205,
90 Cal.Rptr. 24, 474 P.2d 992 (1970)

In Re Downs, 3 Cal.3d 694,
91 Cal.Rptr. 612, 478 P.2d 44 (1970)

In Re Hannie, 3 Cal.3d 520,
90 Cal.Rptr. 742, 476 P.2d 110 (1970)

In Re Johnson, 3 Cal.3d 404,
90 Cal.Rptr. 569, 475 P.2d 841 91970)

In Re King, 3 Cal.3d 226,
90 Cal.Rptr. 15, 474 P.2d 983 (1970)

In Re Lopez, 3 Cal.3d 147,
89 Cal.Rptr. 614, 474 P.2d 430 (1970)

In Re Smith, 3 Cal.3d 192,
90 Cal.Rptr. 1, 474 P.2d 969 (1970)
(Petition for habeas corpus treated as application to recall remittitur; the latter California remedy is described in Hayward v. Stone, 496 F.2d 844, 845 (9th Cir. 1974)

In Re William M., 3 Cal.3d 16,
89 Cal.Rptr. 33, 473 P.2d 737 (1970)

In Re Banks, 4 Cal.3d 337,
93 Cal.Rptr. 591, 482 P.2d 215 (1971)

In Re Crow, 4 Cal.3d 613,
94 Cal.Rptr. 254, 483 P.2d 1206 (1971)

In Re Terry, 4 Cal.3d 911,
95 Cal.Rptr. 31, 484 P.2d 1375 (1971)

In Re Van Geldern, 5 Cal.3d 832,
97 Cal.Rptr. 698, 489 P.2d 578 (1971)

In Re Ferguson, 5 Cal.3d 525,
96 Cal.Rptr. 594, 478 P.2d 1234 (1971)

In Re Tucker, 5 Cal.3d 171,
95 Cal.Rptr. 761, 486 P.2d 657 (1970)

In Re Banks, 6 Cal.3d 91,
98 Cal.Rptr. 314, 490 P.2d 826 (1971)

In Re Cortez, 6 Cal.3d 78,
98 Cal.Rptr. 307, 490 P.2d 819 (1971)

In Re Gonzales, 6 Cal.3d 346,
99 Cal.Rptr. 17, 491 P.2d 809 (1971)

In Re Sutherland, 6 Cal.3d 666,
100 Cal.Rptr. 129, 493 P.2d 857 (1972)

In Re Watson, 6 Cal.3d 831,
100 Cal.Rptr. 720, 494 P.2d 1264(1972)

In Re Franklin, 7 Cal.3d 126,
101 Cal.Rptr. 553, 496 Pac. 465 (1972)

In Re Jordan, 7 Cal.3d 930,
103 Cal.Rptr. 849, 500 P.2d 873 (1972)

In Re Minnis, 7 Cal.3d 639,
102 Cal.Rptr. 749, 498 P.2d 997 (1972)

In Re Smith, 7 Cal.3d 362,
102 Cal.Rptr. 335, 497 P.2d 807 (1972)

In Re Davis, 8 Cal.3d 798,
106 Cal.Rptr. 178, 505 P.2d 1018(1973)

In Re Lynch, 8 Cal.3d 410,
105 Cal.Rptr. 217, 503 P.2d 921 (1972)

In Re Prewitt, 8 Cal.3d 470,
105 Cal.Rptr. 318, 503 P.2d 1326(1972)

In Re Brown, 9 Cal.3d 612
108 Cal.Rptr. 465, 510 P.2d 1017(1973)

In Re Brown, 9 Cal.3d 679,
108 Cal.Rptr. 801, 511 P.2d 1153(1973)

In Re Crumpton, 9 Cal.3d 463,
106 Cal.Rptr. 770, 507 P.2d 74 (1973)

In Re Underwood, 9 Cal.3d 345,
107 Cal.Rptr. 401, 508 P.2d 721 (1973)

In Re Benoit, 10 Cal.3d 72,
109 Cal.Rptr. 785, 514 P.2d 97 (1973)

In Re Birch, 10 Cal.3d 314,
110 Cal.Rptr. 212, 515 P.2d 12 (1973)

In Re Buckley, 10 Cal.3d 237
110 Cal.Rptr. 121, 514 P.2d 1201(1973)

In Re Foss, 10 Cal.3d 910,
112 Cal.Rptr. 649, 519 P.2d 1073(1974)

In Re Law, 10 Cal.3d 21,
109 CAl.Rptr. 573, 513 P.2d 621 (1973)

In Re Rosoto, 10 Cal.3d 939,
112 Cal.Rptr. 641, 519 P.2d 1065(1974)

In Re Yurko, 10 Cal.3d 857,
112 Cal.Rptr. 513, 519 P.2d 561 (1974)

In Re Boyle, 11 Cal.3d 165,
___Cal.Rptr.___, ___P.2d___ (1974)

In Re Love, 11 Cal.3d 179,
___Cal.Rptr.___,___P.2d___ (1974)

In Re Sturm, 11 Cal.3d 258,
___Cal.Rptr.___, ___P.2d___ (1974)

In Re Kapperman, 11 Cal.3d 542,
___Cal.Rptr.___, ___P.2d___ (1974)

In Re Grey, 11 Cal.3d 554,
___Cal.Rptr.___, ___P.2d___ (1974)

In Re Weber, 11 Cal.3d 703,
___Cal.Rptr.___, P.2d ___ (1974)

In Re Bye, 12 Cal.3d 96,
___Cal.Rptr.___, ___P.2d___ (1974)

In Re Valrie, 12 Cal.3d 139,
___Cal.Rptr.___, ___P.2d___ (1974)

In Re La Croix, 12 Cal.3d 146,
___Cal.Rptr.___, ___P.2d___ (1974)

In Re Russell, 12 Cal.3d 229,
___Cal.Rptr.___, ___P.2d___ (1974)

In Re Coleman, 12 Cal.3d 568,
___Cal.Rptr.___, ___P.2d___ (1974)

In Re Jordan, 12 Cal.3d 575,
___Cal.Rptr.___, ___P.2d___ (1974)

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